

From: [Clark, Jacqueline](#)
To: [Edward W. Dwyer](#)
Subject: RE: Wedron Ground Water Site
Date: Tuesday, April 23, 2013 8:31:00 AM

Ed – my condolences to you and your family.

I'm contacting counsels for all the parties this week to discuss entering into an AOC limited to investigation. Given your family situation, we can talk about this further next week. -Jacquie

Jacquie Clark

Associate Regional Counsel

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From: Edward W. Dwyer [<mailto:edwyer@hddattorneys.com>]

Sent: Tuesday, April 23, 2013 5:08 AM

To: Clark, Jacqueline

Subject: RE: Wedron Ground Water Site

Jacquie, thanks for the follow up and copies of the responses. I apologize for not getting back to you yesterday. Unfortunately, my father passed away during the night after a long illness. I will be a little tied up the rest of the week in Chicago. However, I will be checking voicemail and e-mail. Thank you, Ed

Ed Dwyer

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From: Clark, Jacqueline [<mailto:clark.jacqueline@epa.gov>]

Sent: Monday, April 22, 2013 4:29 PM

To: Edward W. Dwyer

Subject: FW: Wedron Ground Water Site

Importance: High

Ed – per your request, attached are the written responses EPA received from counsel in response to our request for the parties to enter into an Administrative Order on Consent with EPA that covers investigation, identification of remedial options, and remedy implementation. Jeff Jeep, counsel for the Hoxsey property owners, sent me an email response, below. The other responses are attached. I do not have a written response from Fairmount Minerals, Wedron Silica, or

Technisand due to Jon Faletto's departure from his firm and representation of the FML companies. I meet with new counsel for FML this week. I will follow up with a phone call to you to discuss recent developments.

Thank you,

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From: Jeff Jeep [<mailto:jdjeep@enviroatty.com>]

Sent: Tuesday, March 26, 2013 9:29 AM

To: Clark, Jacqueline

Cc: Michelle Ryan; Kenney, Thomas

Subject: Wedron Ground Water Site

Importance: High

Jacquie,

At our March 18 meeting you stated that you have discussed the issuance of a unilateral administrative order with USEPA Headquarters. You also stated that Region 5 has received a "green light" from Headquarter to issue the unilateral order to the parties. In response to my question, you stated that you have not discussed issuance of the unilateral order with the Department of Justice. It is not clear whether the Agency concluded its deliberative process (decided to issue a unilateral order to my clients) before or after receipt of my correspondence of February 14, 2013 and March 12, 2013. In any event, it is clear that deliberations within the Agency have ended and a final decision has been made to issue a unilateral order to the parties. Please advise if I am incorrect in this regard.

At our March 18 meeting you described three remedial alternatives, one of which was to connect Wedron to the LaSalle public water supply system. We discussed a "ballpark" cost of \$400,000.00 per mile to run the water line. Assuming a distance of eight miles, it would cost in the area of four million dollars to run the line from LaSalle to Wedron. There would be additional costs, for example, related infrastructure, that would increase the cost to an amount well above four million dollars. My clients are unable to enter into an administrative order that requires them to assume such an enormous and unknown liability, even if we ignore the absence of evidence supporting their liability. If the Agency proceeds with its decision to issue a unilateral order to my clients, we will have no choice but to file an action in federal court to obtain judicial review of the order. So as to make

myself perfectly clear on this point: my clients will seek judicial review of any unilateral order the Agency may issue to them, whether under the SDWA or RCRA.

I thus return to my earlier point that the Agency has not consulted with the Department of Justice. DOJ must defend the Agency's final action (the unilateral order). Accordingly, I urge you to invite DOJ to participate in our discussions, so that they can independently assess the litigation risk. This observation is not meant as a criticism of the Agency. Our point is simply that DOJ brings an independent perspective that may be helpful to both parties in our discussions. At the very least, the Agency should delay issuing a unilateral administrative order to my clients until IEPA completes the soil investigation on the Hoxsey property, the subject of my email to you and Michelle earlier today concerning the Access Agreement. There is no reason why IEPA cannot complete the soil investigation in the next few weeks. The investigation will tell us whether tetraethyl lead (TEL) is present in the location of the former underground storage tanks and associated lines. Despite the Agency's response, or, more accurately, lack of response, to our correspondence of February 14 and March 12 concerning the issue of whether migration of contamination from an off-site location makes the Hoxsey property a "source", we believe DOJ would want an answer to this question before the Agency takes final action that will initiate litigation that DOJ must defend. Although we find the proposition dubious at best, let us assume that DOJ agrees with the Agency that this Site presents an excellent opportunity to convince the Seventh Circuit to embrace the "passive migration" doctrine. And let me be clear: if necessary, we intend to pursue this case as far as necessary. DOJ will want to address the passive migration issue directly – that is, whether the current owner of property **on which somebody** actively disposed of a hazardous substance is liable for the "passive migration" of hazardous substance from that property. In order for the DOJ to reach the "passive migration" issue at the Hoxsey property, it **will**, as a threshold matter, be required to convince the Seventh Circuit that a property is a "source" even if contaminated by migration from an off-site location. We find it hard to believe under such circumstances that all concerned do not want to know whether the USTs and associated lines on the Hoxsey property leaked petroleum.

So, again, we urge you to delay issuance of the unilateral order to our clients until IEPA completes the soil investigation at the Hoxsey property, and to invite DOJ to participate in our discussions.

Regards,

Jeffery D. Jeep

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